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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Appellant,

v.

JOSE LUIS GARCIA,

Defendant and Respondent.

E065395

(Super.Ct.No. INF1401639)

OPINION

APPEAL from the Superior Court of Riverside County. James S. Hawkins, Judge.
Affirmed.

Michael A. Hestrin, District Attorney, Natalie M. Lough, Deputy District
Attorney, for Plaintiff and Appellant.

Steven L. Harmon, Public Defender, and William A. Meronek, Deputy Public
Defender, for Defendant and Respondent.

This is an appeal by the People following a denial of their request to modify the victim restitution order. The People's sole contention on appeal is that the trial court's refusal to modify the restitution order constitutes legal error. For the reasons explained below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On November 9, 2013, defendant broke into a residence in Desert Hot Springs and stole a computer from the home.

On June 12, 2014, a felony complaint was filed charging defendant with one count of residential burglary (Pen. Code, § 459).¹ The complaint further alleged that defendant had suffered one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), one prior serious felony conviction (§ 667, subd. (a)), and one prior prison term (§ 667.5, subd. (b)).

On March 18, 2015, pursuant to a negotiated plea agreement, defendant pleaded guilty to the burglary offense and admitted that he had suffered one prior strike conviction. In return, defendant was promised the remaining charges would be dismissed, he would be sentenced to four years in state prison with credit for time served, and he would be ordered to pay \$300 in victim restitution. Under the terms of the written plea agreement, defendant agreed that he "will be ordered to pay restitution to the victim(s) if the victim(s) suffered economic harm." Defendant agreed that "the amount

¹ All future statutory references are to the Penal Code unless otherwise stated.

of victim restitution is [\$]300.” The written plea agreement also indicated that if either party did not agree with the amount of direct victim restitution “the probation department will determine the amount.” The written plea agreement was signed by the deputy district attorney, defendant, and defense counsel.

After defendant pleaded guilty to the offense and admitted the prior strike conviction, defendant waived formal probation and requested immediate sentencing. The trial court thereafter sentenced defendant in accordance with the negotiated plea agreement and dismissed the remaining allegations. The People did not request a referral to the probation department to determine the amount of victim restitution or indicate to the court that the full amount of the loss had not already been determined. The People also made no request that the restitution order include a provision that the amount of the victim restitution order shall remain to be determined at the direction of the court.

About nine months later, on December 9, 2015, the People filed a request to be added onto the court’s calendar “in order to request restitution.”

Pursuant to the People’s request, the court held a hearing on December 15, 2015. At that time, the People requested a modification of the victim restitution order. Specifically, the prosecutor argued that the note in his files “indicates that the restitution owed was an amount of \$3,200 and that perhaps that’s why we’re adding it to calendar to see if we can, in fact, get the appropriate amount—the appropriate amount ordered.” The trial court responded that the prosecutor “wrote in \$300 on a plea form.” He replied, “Yes. And I’m not sure whether Mr. [] was aware of the amount at the time or whether

this is a subsequent expense that the victim has incurred.” Defense counsel objected to modifying the amount of the victim restitution. Defense counsel argued that “it was a negotiated disposition between the defense and the People” and that “both sides got the benefit of their bargain.” Defense counsel further noted it was agreed by both parties that victim restitution would be in the amount of \$300. The matter was thereafter continued shortly to allow the prosecutor who had requested the hearing to be present.

After the prosecutor arrived, she argued that the People were not “aware of the fact that [the] victim had lost an amount of \$3,200 and is owed a restitution for repair to damages to the house and missing items.” She further stated, “On this conviction for residential burglary, pursuant to Penal Code section 1202.46, entitled Retention of Jurisdiction for Restitution, the Court retains jurisdiction after sentencing, order any amount of restitution ex-parte. The defendant does not need to be present. If the defendant—once it is ordered, if the defendant chooses to challenge that amount, he can then do that and, at that point, he can be brought back.” The court responded, “All that is true, except in this situation, you didn’t write ‘to be determined.’ You wrote a specific amount that the defendant agreed to.” The prosecutor believed that there was no need to have defendant present or allow defendant to withdraw his plea. Following further argument, the trial court denied the People’s request to modify the victim restitution, noting “in the words of the D.A.’s office, ‘a deal is a deal.’ ”

On February 11, 2016, the People filed a timely notice of appeal.

II

DISCUSSION

The People argue the trial court's refusal to modify the restitution order constitutes legal error because the court's reasoning directly contradicts relevant constitutional and statutory authority. The People, therefore, request a remand for the trial court to conduct a restitution hearing.

Section 1192.5 provides that, "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea." Victim restitution is punishment for purposes of section 1192.5. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1222 (*Brown*).) A victim restitution order significantly exceeding the amount specified in a plea agreement violates the agreement. (*Id.* at p. 1224.)

A promise in a plea agreement that is part of the inducement or consideration must be fulfilled. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*), overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) The failure of the state to do so violates due process and raises a constitutional right to a remedy. (*Walker*, at p. 1024.) Here, the People and defendant agreed that "the amount of victim restitution is [\$]300." The written plea agreement was signed by the district attorney, defendant, and

defense counsel. The written plea agreement did not indicate that the amount of direct victim restitution would be determined at a later time by the court or the probation department. The restitution order here did not deprive the People of any consideration they were to receive under the written plea agreement. Pursuant to the negotiated plea agreement, defendant pleaded guilty to the burglary offense and admitted the prior strike conviction allegation. Thereafter, the remaining allegations were dismissed, and defendant was sentenced to four years in state prison and ordered to pay \$300 in victim restitution, as agreed by the parties. The record is clear that both parties received the benefit of the bargain.

If the People did not contemplate full victim restitution in the amount of \$300, the People could have objected to the amount or left the amount to be determined. This lack of objection demonstrates that no one in the trial court seemed to believe the amount was in error or that the amount was not reasonable to compensate the victim as required by section 1202.4.² Indeed, the amount of victim restitution was not even challenged until about nine months after defendant was sentenced. Moreover, the People made an insufficient request to modify the amount of victim restitution. The People did not file a

² Section 1202.4, subdivision (a)(1), provides: “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” (§ 1202.4, subd. (a)(1).) For a defendant sentenced to prison, “[c]ourts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction.” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049; see *People v. Lai* (2006) 138 Cal.App.4th 1227, 1247 [construing “criminal conduct” language in § 1202.4, subd. (f)].)

written motion with supporting evidence to support the increase. The People simply requested “to be added to calendar in order to request restitution.” However, full victim restitution had already been ordered at the time defendant was sentenced approximately nine months earlier. Additionally, at the time of the requested hearing, the district attorney simply argued they were not aware “of the fact that [the] victim had lost an amount of \$3,200 and is owed a restitution for repair to damages to the house and missing items.” Nonetheless, the incident occurred on November 9, 2013, more than *two years* earlier. And, any alleged damages to the victim’s house and any other missing items, other than the computer, should have been known by the People and readily ascertainable from the time of the burglary to the March 18, 2015 plea agreement and sentencing.

Given the delay of more than 17 months between the time of the November 9, 2013 incident and the March 18, 2015 plea hearing, the trial court reasonably assumed that any and all costs had been determined prior to the March 18, 2015 sentencing hearing. This assumption was reasonable because the amount of any losses in this case were fixed and readily determinable. This was not a case where there were ongoing medical or counseling expenses that made it impossible to accurately determine the full amount of direct victim restitution prior to sentencing. There is nothing in the record to suggest that the trial court here violated relevant constitutional and statutory authority.

The People rely on *People v. Valdez* (1994) 24 Cal.App.4th 1194, 1203 (*Valdez*) for the proposition that victim restitution cannot properly be the subject of plea

negotiations. *Valdez* is inapposite because it construes Government Code section 13967, subdivision (c), which applies only where the defendant is denied probation. (*Valdez*, *supra*, 24 Cal.App.4th at pp. 1197-1204.) In any event, *Valdez* does not hold, even in that statutory context, that the parties may not negotiate over the amount of victim restitution. *Valdez* holds only that under Government Code section 13967, subdivision (c), neither the prosecution nor the trial court can “bargain away the victim’s constitutional and statutory right to restitution.” (*Valdez*, *supra*, 24 Cal.App.4th at p. 1203; accord, *Brown*, *supra*, 147 Cal.App.4th at p. 1226; § 1202.4.) In other words, what “cannot properly be the subject of plea negotiations” (*Valdez*, *supra*, at p. 1203) is the right to restitution itself. Nothing in *Valdez* or *Brown* purports to bar the parties from negotiating over the amount of full restitution due to the victim.³

The People also rely on *People v. Pierce* (2015) 234 Cal.App.4th 1334 for the proposition that the trial court may modify a restitution order after the initial sentencing hearing. However, *Pierce* is distinguishable because at the initial sentencing hearing the

³ *Brown*, *supra*, 147 Cal.App.4th 1213 held: “A sentence without an award of victim restitution is invalid. [Citations.] A trial court has no discretion over the issuance of the award itself [citation] and ‘really very little discretion’ over the amount of the award [citation]. ‘The statute requires the award be set in an amount which will fully reimburse the victim for his or her losses unless there are clear and compelling reasons not to do so.’ [Citation.] A court’s reasons for awarding less than full restitution must be stated on the record. [Citation.] Thus, just as a sentence lacking a victim restitution award is invalid, a sentence awarding less than full victim restitution is similarly unauthorized when the court fails to state clear and compelling reasons for its decision.” (*Id.* at pp. 1225-1226, fn. omitted.) Here, victim restitution was awarded at the time of sentencing, and, contrary to the People’s contention, there is nothing in the record to suggest the trial court awarded anything less than full restitution at the time of the plea and sentencing hearing.

trial court explicitly “reserved jurisdiction to set or modify the victim restitution.”

(*Pierce, supra*, at p. 1336.) In other words, the trial court in *Pierce* followed the mandate of section 1202.4, subdivision (f), to reserve jurisdiction to modify the victim restitution where it could not be ascertained at the time of sentencing. By contrast, the trial court in the instant case reasonably believed it had ordered full victim restitution in the amount of \$300 at the time of sentencing, and thus had no reason to reserve its jurisdiction for any future modification request, or believe the amount was in error. The record in this case clearly shows that the parties had come to an agreement as to the full restitution amount the victim was entitled to receive. The People could have asked that the matter be referred to probation for its assessment of the victim’s losses, but failed to do so. Likewise, the People could have requested the trial court reserve its jurisdiction to modify the victim restitution order if it had any reason to believe the order was potentially insufficient, but again failed to do so.

Ultimately, in light of the People’s agreement to the amount of the restitution order, the failure to object to the restitution amount, and the lack of support for the People’s claims, we affirm the trial court’s order.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.